

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA 2007 SEP -7 PM 1:09

STEPHEN E. LYNN, CLERK
U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYER HEALTHCARE, LLC; HIMCO WASTE-
AWAY SERVICE, INC.; AACOA INC.; ACCRA-PAC,
INC.; AMERICAN GAGE AND MACHINE COMPANY;
AMERICAN PREMIER UNDERWRITERS, INC.;
BEAZER EAST, INC.; BRIDGESTONE FIRESTONE
NORTH AMERICAN TIRE, LLC; CHAMPION HOME
BUILDERS CO.; COLEMAN CABLE, INC; CROSBIE
FOUNDRY COMPANY, INC.; CTS CORPORATION;
DURA AUTOMOTIVE SYSTEMS, INC.; E.K. BLESS-
ING CO., INC.; ELIXIR INDUSTRIES; ELKHART
BRASS MANUFACTURING CO. INC.; ELKHART
GENERAL HOSPITAL; GASKA TAPE INC.; HARTSON-
KENNEDY CABINET TOP CO. INC.; HENKELS &
McCOY, INC.; INDIANA MICHIGAN POWER COM-
PANY; KAMPCO STEEL PRODUCTS, INC.; LITHO-
TONE, INC.; PHILIPS ELECTRONICS NORTH
AMERICA CORPORATION; STEINWAY MUSICAL
INSTRUMENTS, INC; TRIMAS CORPORATION;
TRUTH PUBLISHING COMPANY, INC.; UNIVERSAL
FOREST PRODUCTS EASTERN DIVISION, INC.;
WALERKO TOOL & ENGINEERING CORPORATION;
WELLS CARGO, INC.; and WYETH, INC.;

Defendants.

2:07CV304 TS

COMPLAINT

The United States of America, by the authority of the Attorney General and through its undersigned attorneys, acting on behalf and at the request of the Administrator of the United States Environmental Protection Agency ("U.S. EPA"), files this Complaint and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action for injunctive relief and recovery of costs under Sections 106(a) and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9606(a) and 9607. The United States seeks injunctive relief under Section 106(a), 42 U.S.C. § 9606(a), requiring Defendants to implement U.S. EPA's selected remedy at the Himco Dump Superfund Site (the "Site") in Elkhart, Indiana. The United States also seeks recovery, pursuant to CERCLA Section 107, 42 U.S.C. § 9607, of unreimbursed costs incurred and to be incurred for response activities at the Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action and over the Defendants pursuant to Sections 106(a), 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9606(a), 9607(a) and 9613(b), and under 28 U.S.C. §§ 1331 and 1345.

3. Venue is proper in this District under Sections 106(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9606(a) and 9613(b), and 28 U.S.C. § 1391(b) and (c), because the claims arose and the threatened and actual releases of hazardous substances occurred at the Site, which is located within this judicial district.

THE DEFENDANTS

4. Defendant Bayer Healthcare, LLC ("Bayer Healthcare"), a Delaware limited liability company, is a wholly owned subsidiary of the Bayer Corporation ("Bayer"). Bayer Healthcare is a successor in interest to Miles Laboratories, Inc. which, at all relevant times, operated pharmaceutical and related manufacturing facilities in the Elkhart area. Bayer Healthcare is currently the owner of a portion of the Site, within the meaning of Section 107(a)(1) of CERCLA, 28 U.S.C. § 9607(a)(1). Bayer Healthcare's predecessor (Miles

Laboratories Inc.), by contract, agreement or otherwise, arranged for disposal or treatment at the Site of hazardous substances that it owned or possessed, within the meaning of Sections 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a).

5. Defendant Himco Waste-Away Service, Inc. ("Himco"), an Indiana corporation, was the operator of the Site during the relevant time period, within the meaning of Section 106(a)(2), 42 U.S.C. § 9606(a)(1).

6. Each of the following Defendants is a person (or succeeded to the liability of a person) which arranged for disposal of hazardous substances at the Site within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9603(a)(3). Each of these persons is listed below with a parenthetical reference to the State in which it is incorporated: AACOA, Inc. (Indiana), d/b/a KIK Indiana; American Gage & Machine Company (Illinois); American Premium Underwriters, Inc. (Pennsylvania); Beazer East, Inc. (Delaware); Bridgestone Firestone North American Tire, LLC (Delaware); Champion Home Builders, Inc. d/b/a/ Titan Homes (Michigan); Coleman Cable, Inc. (Delaware); Crosbie Foundry Company, Inc. (Indiana); CTS Corporation (Indiana); Dura Automotive Systems Inc. (Delaware); E.K. Blessing Co. Inc. (Indiana); Elixir Industries (California); Elkhart Brass Manufacturing Company, Inc. (Indiana); Elkhart General Hospital (Indiana); Gaska Tape Inc. (Indiana); Hartson-Kennedy Cabinet Top Co., Inc. (Indiana); Henkels & McCoy, Inc. (Pennsylvania); Indiana Michigan Power Company; KampCo Steel Products, Inc. (Indiana); Lithotone, Inc. (Indiana); Philips Electronics North America Corporation; Steinway Musical Instruments, Inc.; Trimas Corporation (Delaware); Truth Publishing Company, Inc. (Indiana); Universal Forest Products Eastern Division, Inc. (Michigan); Walerko Tool and Engineering Corp. (Indiana); Wells Cargo, Inc. (Indiana); Wyeth Inc. (Delaware). Indiana Michigan Power Company, an Indiana corporation, is an owner of a

portion of the Site within the meaning of Section 107(a)(1) of CERCLA, 28 U.S.C. § 9607(a)(1), and is also a generator within the meaning of CERCLA Section 107(a)(3), 42 U.S.C. § 9607(a)(3).

7. Each named Defendant is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

GENERAL ALLEGATIONS

8. The Himco Dump Superfund Site occupies approximately 60 acres of low-lying marshland in Elkhart, Indiana. Between 1960 and 1976, the Site was operated as a landfill that received medical, pharmaceutical and industrial waste from numerous sources, including various of the Defendants identified in paragraphs 4 and 6, *supra*. Wastes from these sources were placed on the ground or in a series of trenches and were allowed to commingle. The Site was operated by Himco Waste-Away Service, Inc. The Site was owned in part by Miles Laboratories, Inc., (now Bayer Healthcare), which generated some 70% of the waste disposed of at the Site.

9. In 1974, the Indiana State Board of Health ("ISBH"), in response to complaints from neighboring residents regarding discoloration and foaming of their drinking water, began investigating disposal practices and potential contamination at the Site. ISBH ordered closure of the Site in 1976, at which time the facility was covered with approximately one foot of sand overlying a calcium sulfate layer.

10. Subsequent investigations by U.S. EPA indicated that groundwater down-gradient from the Site was contaminated with a number of hazardous substances, including metals such as aluminum, arsenic, barium, chromium, cadmium, lead, nickel, mercury and zinc, and organic compounds such as acetone, benzene, chloroethane, trans-1,2-dichloroethane, freon, phenol and pyrene, among others. Additional groundwater testing by EPA in 1990 revealed high

levels of sodium and manganese, which are also hazardous substances. In 1991, Himco, Miles and the City of Elkhart began providing municipal water service to replace use of water from private wells for residents living south of the Site.

11. In 1989, EPA began a remedial investigation/feasibility study ("RI/FS") of the Site. In the process of excavating test pits for the RI, leachate from the landfill's fill material was found to be contaminated with hazardous substances.

12. In February 1990, the Site was placed on the National Priority List ("NPL") at 40 C.F.R. Part 300, Appendix B. The NPL is a national list of priorities for response actions under CERCLA, based on the relative risk of danger to public health or welfare or the environment.

13. In 1990, Himco entered into an Administrative Order on Consent ("AOC") for an emergency removal of 71 55- gallon drums containing volatile organic compounds ("VOCs"), such as ethyl benzene and toluene, which had been buried at the Site.

14. Following completion of the RI/FS in August 1992, in In September 1993, EPA issued a record of decision ("ROD") for the Site, which selected the remedial action that EPA determined to be necessary to eliminate or minimize the migration of contaminants in the groundwater and to reduce the risks associated with exposure to contaminated groundwater and soil. The original remedy, among other things, included a five foot thick composite landfill cap or cover. After issuance of the original ROD, EPA obtained new information regarding the eastern portion of the Site and adjacent areas, which required the provision of municipal water service or bottled water to an enlarged group of residents.

15. In December 2004, U.S. EPA issued a ROD amendment which, among other things, modified and/or replaced the original composite cap remedy and established

contingencies for further groundwater containment and remediation. The Amended ROD also provided for removal and disposal of contaminated material in the construction debris area and installation of an active landfill gas collection and treatment system at the Site.

16. The Himco Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

17. "Hazardous substances" within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and 40 C.F.R. § 300.1 et seq. were spilled, leaked, discharged or otherwise disposed of at the Site.

18. There have been "releases" and threatened releases of hazardous substances at or from the Site within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

19. As of August 15, 2005, U.S. EPA has incurred costs related to the Site, including costs of investigation and enforcement activity, in excess of \$ 6,335,069. These response costs were incurred in a manner not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300. In January 2005, U.S. EPA issued a demand to certain of the Defendants for the costs accrued to that date.

FIRST CLAIM FOR RELIEF

20. Paragraphs 1-19 are realleged and incorporated herein by reference.

21. Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), provides in pertinent part:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the

United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

22. By Executive Order 12580 of January 23, 1987, the President's functions under Section 106(a) of CERCLA, 42 U.S.C § 9606(a), were delegated to the Administrator of U.S. EPA.

23. In the 2004 Amended ROD for the Site, the Regional Administrator of U.S. EPA, Region 5, acting pursuant to his delegated authority, determined that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of the release or threatened release of hazardous substances at the Site.

24. Pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), the United States is entitled to such relief from the Defendants as may be necessary to abate the danger or threat to the public interest posed by the release or threatened release of hazardous substances at the Site.

SECOND CLAIM FOR RELIEF

25. Paragraphs 1-19 are realleged and incorporated herein by reference.

26. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part:

(1) the owner or operator of a vessel or a facility,

* * * * *

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and . . .

shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan. . . .

27. The United States has incurred and will continue to incur costs of response actions not inconsistent with the National Contingency Plan to respond to the release or threatened release of hazardous substances at and from the Site, within the meaning of Section 101(23), (24), and (25) of CERCLA, 42 U.S.C. § 9601(23), (24), and (25).

28. Defendants are liable to the United States for all response costs, including the costs of any removal and remedial actions, incurred in the past or to be incurred in the future by the United States with respect to the Site, plus interest on the applicable response costs, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, respectfully requests that this Court enter a judgment against Defendants as follows:

1. Order the Defendants jointly and severally to abate the threat posed by the release or threatened release of hazardous substances by performing the remedy selected by U.S. EPA in the Amended ROD;

2. Order the Defendants jointly and severally to pay all response costs incurred by the United States in response to the release and threat of release of hazardous substances at the Himco Dump Site, plus interest on the applicable response costs;

3. Enter a declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), against the Defendants on liability that will be binding on any subsequent action to recover further response costs or damages;

4. Award Plaintiff its costs and disbursements in this action; and

5. Grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

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5. Grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

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